No. 101.

No. 101. October Term, 1902.

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Supreme Court of the United States.

Filed Dec. 2, 1902.

Western Union Telegraph Company, Plaintiff in Error,

against

The Borough of New Hope, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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IN THE SUPREME COURT OF THE UNITED STATES.

Western Union Telegraph Company, Plaintiff in Error,

vs.

The Borough of New Hope, Defendant in Error.

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No. 101.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Superior Court of Pennsylvania. The facts involved are very simple. By ordinance of 1894 the Borough of New Hope imposed an annual license fee of one dollar per pole and two dollars and a half per mile of wire upon the telegraph, telephone, and electric light poles and wires within its limits.

The Western Union Telegraph Company had constructed, and for a long time prior thereto and since has maintained and operated a line of about one mile of telegraph poles and wires through said Borough, and this suit was brought in the Court of Common Pleas of Bucks County to recover said license tax for the four years 1895-1898, both inclusive.

There was no evidence whatever in support of the reasonableness of the license fee charged and sued for, except only the inference held to arise from the adoption of the ordinance itself imposing the same, nor was there any evidence, or even allegation, of any expense to which the Borough might in the future be expected to be put in respect thereto.

There was affirmative and uncontradicted evidence that the line of telegraph poles and wires for the maintenance of which the charge sued for was imposed, was used exclusively for interstate and international business; that in fact the company had no local office in New Hope, but that the Philadelphia and Reading Railroad Company's telegraph handled the business of New Hope and delivered it to the Western Union at Philadelphia, and that the gross receipts of this business averaged from seven dollars per month to seven dollars and fifty cents per month. (Record, page 22.)

It will thus be seen that the gross receipts of the business in New Hope were from eighty-four dollars to ninety dollars a year, while the tax amounted to sixty-six dollars a year—say seventy-five per cent. of the gross receipts if the Western Union Company had had the business.

It was further shown that the cost value of the line taxed was about $372, while the annual license tax was sixty-six dollars, or about eighteen per cent. of the full value of the property. (Record, page 23.)

It was further shown that the total cost to the Western Union Company of inspecting and repairing its lines of telegraph, including therein the new poles, new wires, cross arms, fixtures, and material used in such repair per mile of wire per annum, was for thirteen years, an average of one dollar and forty-nine and one-half cents, as against which the amount of the license charged in this case was five dollars and fifty cents per mile of wire per annum, or about three hundred and seventy-five per cent. of the cost of the maintenance and repair thereof, which necessarily included therein the inspection thereof.

And furthermore, it was shown that the Borough employed no policemen to aid in this police regulation, but that on holidays, when the burgess saw fit to appoint a policeman, he often called on the constable, for which he was generally paid two dollars and fifty-cents a day, and in the record of the expenses of the Borough for one year, which was given in evidence, the item appears, "Police service, $4.00." (Record, pages 24-26.)

And furthermore, it was shown by the secretary of the Council of New Hope, that during all the years for which the license tax was charged, the Borough of New Hope had expended no money on account of the poles and wires of the telegraph companies (Record, page 23), and by a lineman stationed at New Hope, that during all the years involved the Borough had never done anything "in the way of inspecting, repairing, removing, or anything else in connection with the poles and wires of those telegraph companies." (Record, page 27.) The uncontradicted evidence in the case, therefore, established that there was no justification in law whatever for the imposition of the pole and wire license tax sued for in this case, except only that as the Borough chose to impose it and the court held it was presumed to be right.

The court declined the request of the telegraph company to instruct the jury to find for it, but left it to them to decide—

> "Whether it (the license tax sued for) exceeds, under all the circumstances what may be the necessary, the probable or the expectant liability and expense of the Borough of New Hope for the issuing of these licenses, regulating the location of these lines and poles, seeing to their safe maintenance, so as to protect the public and its citizens from injury, and to render them safe and free from being a nuisance upon the streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be; and I do not understand why that should be a question exclusively for the court, more properly than one partly of fact for the jury." (Record, pages 28, 29.)

The verdict was, of course, for the plaintiff, and upon error to the Superior Court that court held that the decisions of the Supreme Court of Pennsylvania established the law in that State in respect to license fees on telegraph poles and wires to be that the same is a valid exercise of the police power.

Third.—That such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution.

"*Fourth.*—That in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense.

"*Fifth.*—That the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities. * * * The facts being undisputed, we take it that the question of the validity of the ordinance was for the court to decide." (Record, page 5.)

ARGUMENT.

I.

The Superior Court of Pennsylvania has jurisdiction of, and its judgment is final in, *inter alia*, all actions in the Common Pleas where the value really in controversy is not greater than $1500, exclusive of costs.

Act of May 5th, 1899, section 1, P. L., 248.

In respect to appeals from the Superior Court to the Supreme Court, it is unnecessary to discuss the phraseology of the Act, as the practice is now settled that a *certiorari* will not issue unless allowed by the Supreme Court itself or one of the judges thereof.

Platt-Barber Co. *vs.* Groves, 193 Pa., 476;
Boyle's License, 190 Pa., 577-580;
In re Melon Street, 182 Pa., 397;
Kraemer *vs.* The Guarantee Trust Co., 173 Pa., 416.

SPECIFICATIONS OF ERROR.

The whole question involved in the case is raised by the following specifications of error, which appear in the record in full at pages 38 and 39, to wit:—

"VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:—

"'Under the evidence in this case the verdict of the jury should be for the defendant.'"

The answer of the learned judge thereto being as follows:—

"Refused."

"VIII. The learned Superior Court of Pennsylvania erred in ruling as follows:—

"'It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone, and electric light companies within city limits, is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year, is not a defense; fifth, that the court will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities.'"

The record shows that the plaintiff in error here petitioned the Supreme Court for the allowance of an appeal from the judgment of the Superior Court in this case, and that such appeal was refused. (Record, page 9.)

It therefore appears in this case that a petition for an appeal having been presented to the Supreme Court of the State and denied by it, that court thus by its own action prevented a review by it of the judgment of the Superior Court; and the judgment of the said last-named court has therefore become the judgment of the highest court of the State in which a decision in this suit can be had, and it follows, therefore, that this court may re-examine the same on writ of error, under the provisions of Revised Statutes, section 709.

Gregory *vs.* McVeigh, 23 Wall., 294;
Polleys *vs.* The Black River Co., 113 U. S., 81;
Fisher *vs.* Perkins, 122 U. S., 522;
Stanley *vs.* Schwalby, 162 U. S., 255;
Bacon *vs.* Texas, 163 U. S., 207.

II.

The plaintiff in error concedes that the Superior Court correctly states the result of the decisions of the Supreme Court of Pennsylvania.

The city of Allentown imposed a license tax of one dollar per annum per telegraph pole and brought suit against the Western Union Telegraph Company to recover same. The court charged, *inter alia*, that "*the expense of inspecting the poles during the years in question amounts to nothing, and at the furthercst it involved only the attention of the police officers for one or two days, and that these officers served at the rate of forty dollars a month,*" but further added that the city had power to impose the tax and that if the jury found that the poles were maintained as alleged then to find for the plaintiff.

Upon error the Supreme Court of Pennsylvania held that the only question was, Whether the license tax was reasonable; that the amount thereof rests with the councils in the first instance, and that

"We cannot say that this discretion has been abused in this instance or that the license fee is unreasonable."

Allentown *vs.* West. Un. Tel. Co., 148 Pa., 117.

Seemingly, therefore, because the amount of the charge in that instance was only seventy-five dollars per annum, the court held that it could not say that it was unreasonable, although there was no evidence whatever of any expense incurred by the city in this regard—no evidence of any expense to be repaid. Apparently the decision was simply an arbitrary exercise of power, and there was not even an attempt to show that it could be sustained by any one of the elements which are stated by all the authorities to be the foundation of the right to impose a pecuniary charge as part of a police regulation, but because the matter involved only seventy-five dollars per annum, it seems to have been treated as *de minimis*.

In a suit brought by the city of Chester to recover like charges the telegraph company filed an affidavit of defense, in which it averred that the sum claimed as a license tax was unjust and unreasonable in that the amount was at least five times "the usual, ordinary, or necessary expense" of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality of the City of Chester.

As to this the court said:

"The difficulty is it does not go far enough. It refers only to the usual, ordinary, or necessary expense of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the

city for a particular year to the particular purposes specified in the affidavit."

> Chester City *vs.* Western Union Telegraph Co., 154 Pa., 464.

In a suit subsequently brought by the city of Philadelphia to recover pole and wire license taxes the telegraph company endeavored to meet this statement by the Supreme Court of the elements of justification for such charges by an affidavit of defense, wherein it averred that the charges imposed were more than ten times "not only the cost of regulating the poles and wires and issuing licenses therefor and of the ordinary or necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury, and expenses of every nature whatsoever."

The court below made absolute a rule for judgment for want of a sufficient affidavit of defense without opinion, and the opinion of the Supreme Court of Pennsylvania brushed aside the allegation of the affidavit in the following manner:—

> "We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the defendant company for want of a sufficient affidavit of defense."

> Philadelphia *vs.* American Union Tel. Co., 167 Pa., 406.

Without going over the whole list of cases, of which the above are fair samples, it is enough to say that the remainder of them reach the same result by the same reasoning as in those above cited, and that no real attempt has ever been made in any of the cases to affirmatively show that the so-called license fee was based upon, or could be supported by evidence of, the actual expense incurred

by the municipality for the necessary inspection or regulation of the poles and wires licensed, or that it had been in any manner subjected to any expense whatever by reason of the erection and maintenance of the poles and wires, nor was there any evidence of any prospective expense or charge to the municipality by reason of the maintenance thereof.

The reasoning seems to be—

First.—That municipalities have the right under the police power to impose a reasonable license fee upon telegraph poles and wires—which is conceded.

Second.—That the adoption of an ordinance imposing such license is *prima facie* evidence of the reasonableness thereof—which need not be disputed in this case.

Third.—That affirmative evidence that no expense whatever has been incurred by the municipality in respect to such poles and wires does not rebut this presumption of reasonableness—this last proposition is disputed by the plaintiff in error and is the point in controversy in this case.

It is to be noted that there is no allegation of any authority whatsoever to impose the charge sued for, except only in the exercise of the police power; it is not sought to justify it as a tax, nor can it be sustained as such, for it is not based upon any assessment of the property involved.

It is not intended to argue that the Borough of New Hope may not supervise the location of the poles erected to sustain the telegraph wires of the plaintiff in error and require them to be properly painted and marked so as to be readily identified, and make such inspection of them as may be necessary to protect the public welfare, and that for the cost of such regulation and supervision and the issuing of such permits as may be required for the better enforcement thereof, the Borough may impose a reasonable license fee;

in other words, that the municipality may make a telegraph company repay to it the expense to which it has been put by reason of the said telegraph company's occupation of its highways.

It is intended to respectfully insist that any license fee in excess of the amount necessary to so reimburse the municipality is unreasonable, and is a tax upon, and regulation of, the interstate commerce carried on by means thereof, against which the plaintiff in error is entitled to claim the protection of this court. The apparent smallness of the amount involved in some of these cases ought not, and legally cannot, influence the decision thereof, for, obviously, if every hamlet having a municipal organization through which lines of telegraph are run can impose a tax of 66/84 or 66/90 of the gross receipts of the local business and eighteen per cent. of the value of the plant, it is quite plain that the telegraph companies will soon be taxed out of existence.

Recently, and while this brief is in preparation, a Court of Common Pleas of Pennsylvania has held that a Township can impose and collect a pole and wire license tax, and as this seems to be in accord with the decisions of the Supreme Court of that State already cited, it is plain that every telegraph pole and every telegraph wire throughout the State is subject to the same tax, and that telegraph companies will therefore be subjected to a burden, the weight of which is fixed only by the caprice of the township, borough, and city authorities, and which in the aggregate will exceed all their taxes properly so called, that is to say, all the taxes which can be or are levied upon their property at a fair and just valuation and at a rate of taxation which bears equally upon other property.

Indeed, it is confidently asserted that if the rule adopted in Pennsylvania and put in practice by numerous of her municipalities is extended throughout that State and other States, the aggregate of the pole and wire tax thus imposed on telegraph companies will exceed all other taxation and exceed all their net revenues. Obviously, the

amount of such taxation would be enormous, yet it is plain to be seen that there is nothing in the decision now appealed from, or in the cases cited by the court in support thereof, that would in any way protect the plaintiff here from such taxation.

As matter of fact the total amount of these taxes has now assumed very grave proportions and is yearly increasing, and, inasmuch as the courts of Pennsylvania have imposed no restrictions upon the amount that the municipalities may thus impose, and have refused to be bound by the restrictions established by the authorities in respect to such license charges upon other kinds of property or occupations, it leaves the telegraph company helpless, except in so far as the Federal courts will protect it by establishing some rule to which the municipalities must conform.

III.

The rule limiting the amount of a license tax imposed under and in aid of the police power is well established to be the amount of the cost of such supervision and regulation and the cost of issuing the license, and under the power to license, express or implied, it is clear that no right exists to impose a larger charge than will approximately reimburse to the municipality the expense of regulation.

> "A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation, and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it."
>
> Cooley on Const. Lim., section 201 (4th ed.).

"The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. When the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers."

Cooley on Taxation, section 408 (4th ed.).

"The power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes."

Dillon on Mun. Corp., section 768 (4th ed.).

The charter of the city of Portland authorized it "*to control and regulate slaughter houses, wash houses, and public laundries and provide for their exclusion from the city limits or from any part thereof*," and under that authority the city council passed an ordinance "*to license and regulate wash houses and public laundries*," providing, *inter alia*, for "*a quarterly license of five dollars*" thereon.

Payment of this charge was resisted upon the ground that a fee of five dollars a quarter for a license to keep a wash house was manifestly a mere pretense for imposing an onerous tax on the business.

After citing and commenting upon numerous authorities upon the subject, the court said:—

"It follows that if the sum required of the petitioner by this ordinance is intended for revenue, and not merely regulation, the same is so far void. A fee may be required for a license issued merely as a means of regulation, but the amount must not be more than is necessary

to cover the cost of issuing the license and the incidental expenses attending the regulation of the business."

Laundry License Case, 22 Fed. Rep., 701.

Where the city of Hoboken by ordinance imposed a license tax on passenger railways cars, it was held:—

"Under the power simply to regulate an ordinance cannot be passed to tax for revenue purposes. In the course of the administration of such a power the public treasury may be incidentally benefited by the imposition of fines and penalties, but in all such cases the amounts imposed must be such as are reasonably necessary to accomplish the regulation."

North Hudson Ry. Co. *vs.* Hoboken, 41 N. J. L. (12 Vroom), 71.

The rule by which the reasonableness of the charge imposed is to be measured is thus stated in a case in which the judgment was affirmed by the Supreme Court of Pennsylvania on the opinion of the court below.

"Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as the municipal authorities may lawfully give to the erection and maintenance of the poles and wires."

Taylor Borough *vs.* Postal Tel. Co., 202 Pa., 583-584.

But it is confidently asserted that, as has been already shown, in none of the cases has the Supreme Court made any effort to apply the rule which it has thus adopted and announced.

In some suits brought by the City of Philadelphia against the telegraph companies for these pole and wire taxes there has been evidence of something done by the employees of the Electrical Bureau of the City in respect to the poles and wires of telegraph companies, and hence it might have been inferred that the City incurred some expense by reason thereof; but other than these suits there is no case in Pennsylvania in which the municipality showed, or even attempted to show, that it had incurred any expense whatever by reason of the maintenance by the telegraph company of its poles and wires within its limits, or by reason of its regulation and supervision over them, and yet, in every instance, the Supreme Court of that State has sustained the validity of these pole and wire taxes upon the sole and only ground that the presumption was that the charge was reasonable, because the municipality had imposed it.

It is too well settled that under the guise of the power to regulate, a city cannot exercise the power to tax to require the citation at length of further authorities. It is sufficient to refer to

Slate *vs.* Hoboken, 4 Vroom, 280;
New York *vs.* 2d Ave. R. R., 32 N. Y., 261;
Cincinnati *vs* Bryson, 15 Ohio, 625;
Mays *vs.* Cincinnati, 1 Ohio St., 268;
Dunham *vs.* Rochester, 5 Cowen, 462.

IV.

The decisions of this court in the cases of the city of St. Louis against the Western Union Telegraph Company do not apply to or in any wise sustain the claim of the Borough of New Hope in this case.

As these cases are likely to be referred to it may be well to consider them fully.

The city of St. Louis passed an ordinance, viz.:—

> "From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, *shall*

pay to the city of St. Louis for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

The Western Union Telegraph Company having declined to pay this charge suit was brought therefor which was tried in the Circuit Court of the United States at St. Louis without a jury and the court there held, that—

"The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, and it is imposed in such form that it can only be regarded as a privilege or license tax which the city has no authority to impose. Judgment will be entered for defendant."

St. Louis *vs.* Western Union Tel. Co., 39 Fed. Rep., 59.

Upon error this court held:—

"And first with reference to the ruling that this charge was a privilege or license tax. To determine this question we must refer to the language of the ordinance itself, and by that we find that the charge is *imposed for the privilege of using* the streets, alleys, and public places, and is graduated by the amount of such use. *Clearly, this is no privilege or license tax.* The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. * * * Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation or upon its business or for the privilege of doing business is thus disclosed by the very terms of the section. *The city has attempted to make*

the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent."

St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, 97-98.

But this court also added:—

"Indeed, it may be observed, in the line of the thoughts heretofore expressed, *that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the city;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."

St. Louis *vs.* West. Un. Tel. Co., *supra*, 105.

A petition for a rehearing of this case was filed upon the ground that the city of St. Louis had no such interest in and control over the streets as authorized it to impose a charge in the nature of rental for the exclusive use of portions thereof.

This court filed an opinion denying said petition and therein said:—

"Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has a supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter, under express authority from the people of the State given in the Constitution, * * * and this char-

ter is an organic Act, so defined in the Constitution, and it is to be construed as organic Acts are construed. The city is in a very just sense an '*imperium in imperio.*' Its powers are self appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter."

City of St. Louis *vs.* Western Union Tel. Co., 149 U. S., 465-467.

The case was retried by the Circuit Court without a jury, and it was again found that even as rental the sum charged was excessive and judgment was given for the defendant.

St. Louis *vs.* Western Union Tel. Co., 63 Fed. Rep., 68.

An appeal was taken by the city to this judgment, but the judgment was finally confirmed by consent.

But the Borough of New Hope has no such power as has the city of St. Louis. The Constitution of Pennsylvania, Article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Pursuant to this mandate the Legislature of Pennsylvania, by Act of 29th April, 1874, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to

incommode the public use of said roads, streets, or highways, or injuriously interrupt the navigation of said waters."

It will thus be seen that the construction and maintenance of telegraph lines within the State of Pennsylvania, including the cities thereof, are directly authorized by the constitution of that State, and the exercise of the power to construct and maintain such lines is fully authorized by the Legislature of Pennsylvania.

That this legislative authority is all that is needed, and that the municipalities cannot restrict or interfere with the same is plain. The line of decisions in Pennsylvania is uniform that the Commonwealth owns the franchise of every highway, and that no municipal corporation has any power over them except in so far as it is delegated to it by the State.

"To the Commonwealth here as to the King in England belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, canals, or public roads laid out by the authority of the Quarter Sessions. In England a public road is called the 'king's highway,' and though it is not usually called the 'Commonwealth's highway' here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority."

O'Connor *vs.* Pittsburgh, 18 Pa. St., 187-189.

"The power of the legislature to establish a turnpike gate in the streets or public ways of a city is hardly to be questioned; it is a part of the eminent domain which belongs to the sovereign authority. It is conceded to the General Assembly by the grant of all legislative power, and is not restrained by the Bill of Rights. There is nothing in the street of a city or town to make it greater or more distinguished than a highway in the rural districts except convenience and the density of population, and these restrain not the power of legislation. The

power of making and repairing roads and removing nuisances is granted by law to supervisors of highways under the direction of the courts, and they are bound to do it; yet this does not prevent the legislature from authorizing turnpikes and the erection of gates on these roads. Neither does the obligation of cities to open and repair streets interpose any barrier against the right of the sovereign power to regulate its highways, and streets in a town or city are nothing more."

Stormfelt *vs.* Manor Turnpike Co., 13 Pa. St., 555-559.

"In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given, without any qualification, and hence the consent of the borough of Millvale to the construction and operation of the road over its streets need not be obtained and is a matter of indifference. * * * This being so, it will be seen at once that the borough has no control over the construction or operation of the road within its limits. *The power of the defendant in the exercise of its franchise is altogether independent of the borough, and is of just as high and authoritative origin as the right of the borough to exist at all.* The rights of both are derived from the same source, to wit, the legislative power of the Commonwealth, and the company is not subject to the slightest obligation to go to the borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the borough councils, and cannot be sanctioned for a moment."

Millvale Bor. *vs.* Evergreen Ry. Co., 131 Pa. St., 1-23-24.

"The right of the Supreme legislative power to authorize the building of a railroad on a street or other public highway is not to be doubted. * * * If such conversion of a public street to purposes for which it was not originally designated does operate severely upon a

portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

Commonwealth *vs.* R. R. Co., 27 Pa. St., 339-354.

The rule in Pennsylvania in this regard is indeed so thoroughly settled that it is not necessary to multiply further these citations. Other and equally strong expressions will be found in—

Case of Philadelphia & Trenton R. R. Co., 6 Wharton, 25;
Commissioners *vs.* Gas Co., 12 Pa. St., 318;
Mercer *vs.* Pittsburgh, &c., Ry. Co., 36 Pa. St., 99;
Danville, &c., R. R. Co. *vs.* Commonwealth, 73 Pa. St., 29;
City of Pittsburgh's App., 115 Pa. St., 4;
Williamsport Pass. Ry. Co.'s App., 120 Pa. St., 1;
Homestead Street Ry. *vs.* Pittsburgh, &c., Ry. Co., 166 Pa. St., 162.

The result of these authorities is thus summarized by a text writer of authority:—

"By virtue of its authority over public ways, the legislature may authorize acts to be done upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may authorize to be done is, of course, lawful, and of such Acts, done pursuant to the authority given, it cannot be predicated that they are nuisances. If they were such without, they cease to be nuisances when they have the sanction of a valid statute.

> As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted."
>
> 2 Dillon Mun. Corp., section 657 (3d ed.).

It is perfectly clear, therefore, that in Pennsylvania there is no power in a municipality to impose any charge upon telegraph companies by way of rental for the use of its streets, because they are expressly authorized by the Constitution and laws of that State to occupy the highways with their poles and wires. Indeed, it will be conceded that the only source of power of the Borough of New Hope to pass the ordinance in question is in its general police power over its streets.

By the Act of 1851, relating to Boroughs of Pennsylvania, it is provided that such Borough shall have power—

> "To make such laws or ordinances, by-laws, and regulations, not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good order and government of the borough."

The clause of the Act of 1851 referring to the regulation of streets is as follows:—

> "To regulate the roads, streets, lanes, alleys, courts, common sewers, public squares, common grounds, footwalks, pavements, gutters, culverts, and drains, and the heights, grades, widths, slopes, and forms thereof, and they shall have all other needful jurisdiction over the same."

This was slightly enlarged by the Act of May 22d, 1883, by the addition thereto of the following language:—

> "They shall have power to survey lay out, enact, and ordain footwalks, pavements, gutters, culverts, and drains over and upon the lands abutting on and along the sides of turnpike roads, which may be within the limits of said boroughs, and to fix the size and widths thereof, and to require the grading, curbing, and guttering thereof by

> the owner or owners of land respectively fronting thereon in accordance with the general regulations prescribed."

This is the whole source of the power of the Borough of New Hope to pass the ordinance in question.

The Act of 1851 specifies minutely the subjects which the Borough may regulate by ordinance, and as to this Act the Supreme Court of Pennsylvania has held:—

> "We are of the opinion that the general powers referred to in the first section must be confined to the particular subjects referred to in succeeding sections. There is no analogy between this ordinance (the one then under discussion) and one requiring coal, hay, or produce to be inspected or weighed, for this is expressly authorized by the Act of 1851, *nor with an ordinance requiring a telegraph company to pay a fixed sum for each of its poles, for this fairly comes within the police power over the streets given by the same Act.*"
>
> Millerstown *vs.* Bell, 123 Pa., 151.

It will, therefore, be seen that in the St. Louis cases when the court below held that the charge imposed was a license tax and unreasonable and therefore void, the judgment was reversed by this court upon the ground that the charge was not a license tax at all, but was a rent for the use of the space occupied by the poles in the highways, which under the constitution of Missouri, peculiar in that respect, the city of St. Louis had a right to impose, but that, inasmuch as "*the occupation by this interstate commerce company of the streets cannot be denied by the city,*" it was for the trial court to determine whether the rental charged was reasonable; and it furthermore appears that upon a retrial of the case in conformity with the instruction given by this court the court below again decided that, as a rental, the charge was unreasonable, and this judgment, although at first appealed from, was finally acquiesced in by the city.

The Borough of New Hope, however, has no power to impose any charge by way of rental, and it has been expressly stated by the Supreme Court of Pennsylvania that the only authority the Borough has to impose a license tax upon telegraph poles and wires is derived, not from the express provisions of the Act of Assembly, but from its general police power, and it, therefore, follows that its power in this behalf must be limited by the rules governing the imposition of pecuniary charges as part and in aid of police regulation of business agencies or property, or otherwise the telegraph company, which is engaged in interstate commerce, is unjustly deprived of the protection which the Constitution of the United States affords it.

V.

Nor can the plaintiff in error be held to pay the charge imposed in this case for the purpose of providing an insurance or guarantee fund to insure the municipality from damages for which it may be held liable by reason of the construction and maintenance of telegraph poles and wires.

This seems, however, to be the controlling thought in the decisions of the Supreme Court of Pennsylvania, which holds that the usual, ordinary, or necessary expense of issuing licenses, &c., makes no provision for the liability imposed upon the city by the erection of telegraph poles, and that as it is the duty of the city to see that the poles are safe and properly maintained—

> "Should a citizen be injured *by reason of the neglect of such duty*, an action might lie against the city for the consequences of such neglect."
>
> Chester City *vs.* Western Union Tel. Co., 154 Pa., 464 (*supra*), page 6;
> Phila. *vs.* American Union Tel. Co., 167 Pa., 406 (*supra*), page 6.

It will no doubt be urged, therefore, in justification of the reasonableness of the charge imposed in this case, that in the event of injury to person or property from the

improper construction or maintenance of a telegraph pole or wire, the municipality would be liable therefor, and that it therefore has the right to protect itself therefrom by imposing such license charges upon the plaintiff in error as will provide a fund for the payment of such damages.

Inasmuch, however, as the municipality cannot exclude the telegraph company from occupying its highways with their poles and wires, as declared by this court in St. Louis *vs.* The Western Union Tel. Co., 148 U. S., 92-98, *supra*, page 12, and as is expressly permitted both by the Constitution and the statutes of Pennsylvania, it is plain that such municipality cannot be in any way held liable merely because such poles and wires are constructed and maintained upon its highways. And it therefore appears that any liability which may be imposed upon the municipality by reason thereof, if indeed any there be, must of necessity arise from the neglect of the municipality to properly exercise its police power to inspect, regulate, and supervise the construction and maintenance of such poles and wires. Indeed, this is expressly so stated by the Supreme Court of Pennsylvania in Chester *vs.* West. Un. Tel. Co., just quoted.

But it is respectfully insisted that it cannot be that a municipality has the right to impose upon a telegraph company the cost to it of its supervision and regulation of the property of that telegraph company, and at the same time and in addition thereto collect from it other sums of money to reimburse it for damages to which it may be subjected by reason of the insufficiency of the regulation and supervision which it has undertaken, or the negligence with which it has performed the duty it has assumed in that behalf, and the cost of which it has already imposed upon and collected from the telegraph company. In other words, the telegraph company cannot be made the insurer to the municipality against liability for the negligence of the municipality itself.

And furthermore, in case of injury to person or property by negligence in the construction and maintenance of telegraph poles and wires, the telegraph company would

itself be primarily liable to the party injured, and certainly cannot call upon a municipality to repay to it any damages which it might be held to pay in such case, although it had through the payment of license charges provided a fund for such purpose. Nor will the telegraph company, after having itself paid the damages, be entitled to ask the return to it of the moneys which it had already paid to the municipality as its insurance against liability for such injury. And again, is it not clear that, in case of injury to person or property by the negligent construction or maintenance of telegraph poles and wires for which the municipality is held liable, such municipality can maintain its action therefor against the telegraph company?

If, therefore, the telegraph company is itself liable to any person injured by reason of the negligent construction and maintenance of its poles and wires, and is liable over again to the municipality if the municipality is held liable for such negligent construction and maintenance, and if the payment of the license charge in question does not operate to exonerate the telegraph company from such liability, it would seem to follow that the municipality cannot sustain the charge upon that ground, and especially that it cannot do so where its liability, that is to say, the liability of the municipality, clearly cannot arise except by reason of its own negligence in the exercise of its police power of regulation and supervision.

> "The City cannot collect and lay by a sum to insure itself against imaginary future demands which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time be subjected to expenditure in resisting unjust claims. This, judged by the past, is not probable. A very trifling annual surplus would provide for it. But, as the contingency is remote, such provision may well be left until it occurs."
>
> Philadelphia *vs.* West. Un. Tel. Co., 40 Fed. Rep., 616.

It is not intended to argue that the municipality cannot, under its police power and by way of a license charge, impose upon the telegraph company the cost to it of the proper exercise of its police power in the supervision and regulation of telegraph poles and wires: that case is not before this court, and never has been, and probably never will be, for the reason that the business necessities of the telegraph companies compel them to maintain their poles and wires in a high state of efficiency and, therefore, of safety. The case is wholly a suppositious one. No evidence was offered, or could be offered, that the municipality had ever been put to any expense whatever on account of this supposed liability, and it is therefore respectfully insisted that it is impossible to argue that a charge can be imposed upon an instrument of interstate commerce by way of insurance when such insurance does not in any way protect or reduce the liability of the party paying the money and the thing insured against is the negligence of the party to whom it is paid.

VI.

That the Western Union Telegraph Company is engaged in interstate commerce and that the business it transacts is in itself commerce, and that by virtue of the Act of Congress of July 24th, 1866, and its acceptance thereof said telegraph company is entitled to all the privileges and immunities and is subject to all the restrictions which flow from the power given to Congress by the Constitution to regulate commerce, and the legislation in that behalf enacted by Congress, as distinctly decided in

Telegraph Co. vs. Telegraph Co., 96 U. S., 1,

a case which has been so often referred to and reasserted by this court as to need no further comment.

VII.

The validity of regulations, whether imposed by a State or a municipality, which, under the guise of an exercise of the police power, impose pecuniary charges upon persons

or corporations engaged in interstate commerce, have been frequently before this court.

Where a State statute imposed a license tax upon drummers and others selling by sample within a certain taxing district, although it made no discrimination between those who represented business houses out of the State and those who represented like houses within the State, it was nevertheless held by this court to be invalid, for the reason that it was a burden on, and, therefore, a regulation of interstate commerce, and as such unconstitutional.

The power of the State to exercise, by virtue of its police power, jurisdiction over persons and property within its limits and provide for the security of the lives, limbs, health, and comfort of persons and the protection of property within those limits, even although it may incidentally affect commerce is not questioned. But it is distinctly stated by this court that interstate commerce cannot be taxed at all by the State, and that the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule.

Robbins *vs.* Shelby Taxing District, 120 U. S., 489.

And this has been since reaffirmed in—

Asher *vs.* Texas, 128 U. S., 129;
Stoutenburgh *vs.* Hennick, 129 U. S., 141;
McCall *vs.* California, 136 U. S., 104;
Brennan *vs.* Titusville, 153 U. S., 289.

That the Western Union Telegraph Company cannot be made to pay a license tax of $245 per annum to the city of Mobile for the privilege of carrying on its business therein has been decided by this court in—

Leloup *vs.* Port of Mobile, 127 U. S., 640.

An Act of the Legislature of the State of Kentucky, entitled an "Act to regulate agencies of foreign express companies," which imposed upon such agents an annual tax of

five dollars with certain small fees for the filing of certain papers relating to the business of the company and required to be filed in the office of the auditor of public accounts was held void as a regulation of commerce.

Crutcher *vs.* Kentucky, 141 U. S., 47;

Although the right of a State in the due exercise of its police power to regulate the inspection and sale of articles of food cannot be questioned, yet this court has always been careful to consider whether under the guise of inspection and of the exercise of the power of protection any burden has been laid upon interstate commerce, and if so, whatever the form of the imposition was, the regulation has been declared unconstitutional and void.

Hannibal & St. J. R. R. Co. *vs.* Husen 95 U. S., 465;
Minnesota *vs.* Barber, 136 U. S., 313;
Brimmer *vs.* Rebman, 138 U. S., 78.

Even where the regulation imposed was in relation to the selling of intoxicating liquors, which is peculiarly a matter of police cognizance, this court has repeatedly held that the power must be so exercised as not to operate as a burden on or regulation of interstate commerce.

Leslie *vs.* Hardin, 135 U. S., 100;
Lyng *vs.* Michigan, 135 U. S., 161.

The councils of Titusville, Pa., by an ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville, imposed a license fee of twenty-five dollars a year upon persons convassing or soliciting within that city orders for goods, books, paintings, wares, or merchandise of any kind, and for a violation thereof imposed a fine not exceeding $100, for a breach of which ordinance one Brennan was convicted and fined twenty-five dollars by the city recorder. The defendant appealed to the Court of Common Pleas, which rendered judgment against him, and then appealed to the Supreme Court of the State, which affirmed the judgment of the court below, and thereupon sued out a writ of error to this court.

The power of the city of Titusville to levy the license tax in question was clearly given by the Act of the Legislature of Pennsylvania of 22d May, 1874, section 20, clause 4 (P. L., 239), viz.:—

> "*To levy and collect license tax* on auctioneers, contractors, druggists, hawkers, peddlers, bankers, brokers, pawnbrokers, merchants of all kinds, grocers, confectioners, restaurants, butchers, taverns, public boarding houses, dram shops, saloons, liquor sellers, billiard tables, bowling alleys, and other gaming tables; drays, hacks, carriages, omnibuses, carts, wagons, street railroad cars and other vehicles used in the city for pay; lumber dealers, furniture dealers, saddle or harness dealers, stationers, jewelers, livery stable keepers, pavement stands, real estate agents, express companies or agencies, telegraph companies or agencies, shows, theatres, and all kinds of exhibitions for pay, and regulate the same by ordinance."

This court said:—

> "The ordinance itself is entitled: 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for 'general revenue purposes,' within the very declarations of the ordinance. *Even if these declarations had been the reverse, and the license in terms been declared to be enacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained.*"

Brennan *vs.* City of Titusville, 153 U. S., 289-299.

Without repeating the language of this court in others of these cases above cited the result of their reasoning may be summarized to be that the police power of a State and, *a fortiori*, of a municipality cannot obstruct interstate commerce beyond the necessity for its exercise. That the question of whether or not under the guise of the exercise of the police power a burden has been laid upon interstate commerce is always open in this court, and the law or ordinance in controversy will be carefully scrutinized to ascertain whether or not any such burden has been in fact imposed; that any charge upon the agent or the agencies involved in the transaction of interstate commerce is a burden upon commerce itself, and cannot be imposed by a State, and, *a fortiori*, by a municipality, without the assent of Congress; and that the silence of Congress in this respect is equivalent to a declaration on its part that it should be absolutely free.

Under these cases, and especially under Leloup *vs.* Mobile (*infra*), which is directly in point, it is clear that the Borough of New Hope cannot impose a charge of sixty-six dollars a year, or any other sum, upon the Western Union Telegraph Company as a license tax upon its occupation, or for the purpose of doing business within the limits of that Borough, but that such tax must be limited to such sum as will reimburse the Borough for the expenses incurred by it in the proper police regulation of the business and agencies of the plaintiff in error.

VIII.

If it be true that the sum charged by the Borough of New Hope against the Western Union Telegraph Company cannot be justified as a tax, not only because it is not based upon any assessment, but also because the Borough is without power to impose such tax, if it be true that it is not a charge in the nature of rental for the use and occupation of such part of the highway as is occupied by the company's poles, because again the Borough has no power to impose such charge in Pennsylvania, and if it be true that the only authority in the Borough to impose such

charge is by virtue of its police power, as it is believed has been conclusively shown in this case, and if the law is that such charge must be limited to such sum as is reasonably necessary to accomplish the police regulation and cover the expenses attending such regulation, as has also been conclusively shown by the authorities cited, then it must be conceded that the evidence affirmatively shows that the charge in question here is excessive, unreasonable, and therefore void.

Although it must be admitted that neither the value of the property or the amount of the receipts from the business which is subjected to police regulation furnish the measure of the charge which as incident to such regulation may be imposed thereon, yet when it is found that the amount of such charge is about eighteen per cent. annually of the whole value of the property, and about seventy-five per cent. of the gross receipts of the telegraph business of the Borough—charges so enormous as to be obviously far beyond the limit of just taxation—it certainly suggests, that, however small the sum involved, the limit of discretion in the exercise of the police power has been overstepped.

A fortiori, therefore, when it is conclusively shown that the Borough has never incurred or been put to any expense whatever in connection with or as incident to the exercise of its police power in any way whatsoever, it follows that the charge sought to be imposed is completely without foundation in right, and that the collection of the amount, however small it may be, is in effect little better than confiscation.

It cannot be denied that the plaintiff in error is engaged in interstate commerce and that its poles and wires are the necessary instrumentalities thereof; it cannot be denied that the charge imposed and sought to be recovered here for the maintenance of said poles and wires is a charge upon and regulation of interstate commerce; and although such poles and wires are subject to proper police regulation by the States and municipalities, and as incident thereto, to a license charge which will reimburse

the cost of such regulation, notwithstanding they are such instrumentalities of interstate commerce—just as they are liable to taxation the same as other property—yet it cannot be denied that it is peculiarly the province of this court to finally determine whether such license charge is, or is not, a proper police regulation and can be lawfully levied, because if it is not, then it is not only unlawful and invalid by general rules of law, but is prohibited by the Constitution of the United States.

The charges sought to be imposed by the ordinance in question are imposed according to the language thereof "for the maintenance of each and every telegraph pole" and "for the maintenance of each and every mile of telegraph wire." (Record, page 20.) But there is no more right in the State or in the municipality to charge for the privilege of maintaining the poles and wires, than there is to charge for the privilege of maintaining an office. The charge is attempted to be justified by the claim that it is in the exercise of the police power, but reimbursement, and reimbursement only, is the ground upon which a pecuniary charge can be sustained as a police regulation, and if it appears that the charges made in this case exceed the limit of reimbursement, then the question of whether or not the amount of the charges are otherwise reasonable or unreasonable for the company to pay is beside the question, for the moment that the amount needed for reimbursement is exceeded, whether intentionally or otherwise, then so far as commerce and its instrumentalities are concerned, the power of the municipality to impose the charges ceases. It is therefore denied that there is any right in the Borough of New Hope to impose any charge in the case under consideration, because as there is nothing to reimburse there can be nothing to sustain the charge made, and the Borough or State of Pennsylvania itself not only has no authority, but it is prohibited by the Constitution of the United States from imposing any such charge.

As against such charge the plaintiff in error is entitled to the protection of the commerce clause of the Constitu-

tion of the United States, as declared and enforced by this court, and it is, therefore, respectfully contended that it is the duty of this court to decide for itself whether the ordinance of the Borough of New Hope imposing the charge, the subject of controversy here, is a legitimate exercise of the police power, or is, under the guise thereof, in fact a burden upon and therefore a regulation of the interstate commerce business of the plaintiff in error.

This court has said:—

"The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States Government created thereby."

Walling *vs.* Michigan, 116 U. S., 446-460.

"The Supreme Court of the United States holds, and has never consciously held otherwise, that a statute of the State and, *a fortiori*, a municipal ordinance intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one State to another, is not within that class of legislation which the States may enact in the absence, of legislation of the Congress, and that such statutes are void even as to such part of transmission as may be within the State."

Railway Co. *vs.* Ill., 118 U. S., 557.

"And while, by virtue of its jurisdiction over business and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated, yet the subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action."

Leslie *vs.* Hardin, 135 U. S., 100-108.

"But the main argument to support the decisions of the Court of Appeals is that the Act in question is es-

sentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem necessary for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

Crutcher *vs.* Kentucky, 141 U. S., 47-59.

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an Act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true, that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions, that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

Brennan *vs.* Titusville, 153 U. S., 289-302.

That a license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce, has been abundantly settled by the adjudications of this court.

Thus, where an importer was required to take out a license and pay a fee of fifty dollars therefor before he was permitted to sell a package of imported goods, it was said:—

"All must perceive a tax upon the sale of an article imported only for sale is a tax on the article itself. * * * So a tax on the occupation of an importer is in like manner a tax on importation."

Brown *vs.* Maryland, 12 Wheaton, 419-444.

"Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * * The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States, or in this court, to control its action, however unreasonable or oppressive."

Welton *vs.* Missouri, 91 U. S., 275-278-281.

Where the Mobile police board fixed the license tax of the Western Union Telegraph Company at $225 per year, this court held the ordinance invalid, and said:—

"Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and in most cases legitmately taxed, but we fail to see how the State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation—a tax on the occupation of doing a business is surely a tax on the business. Now, we have decided that communication by telegraph is commerce, as well as in the nature

of postal service, and if carrried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations except such as are strictly of a police character.* * * *

"In our opinion, such construction of the Constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such tax is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Leloup *vs.* Port of Mobile, 127 U. S., 640-645-648.

It is respectfully submitted that any charges upon the poles or wires of a telegraph company, which are the necessary means of carrying on the business, is as much a tax on that business as would be a license fee exacted from the agent of the company as a condition of his being permitted to exercise his function, or as an occupation tax.

The case of the Postal Telegraph Company *vs.* Charleston, 153 U. S., 692, may be cited. In that case (page 699)—

"The express terms of the ordinance restricted the tax to the business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers, or agents."

And of this ordinance this court said (page 700):—

"If business done wholly within the State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power,' and therefore, inasmuch as the Supreme Court of South Carolina 'had judicially settled

that the power to raise revenue by license tax on business, given by statute to the city council of Charleston, does not violate any provision of the State Constitution,' the occupation tax levied in that case was upheld."

There is, therefore, nothing in the facts, the reasoning, or the decision in that case which is applicable to the case under discussion.

Of the charge in controversy in this case it should be noted that it is not a tax properly so called—it does not profess to be such, and is not based upon the value of the property involved, nor has there been any previous assessment thereof which is a condition precedent to valid taxation. It cannot be justified as a rental for the use of the streets, because the power to occupy those streets is given expressly by the Constitution and laws of Pennsylvania, and the Borough of New Hope has, under the authorities cited, no such authority or interest therein, or power in the premises as to enable it to charge such rental. It cannot be justified as a business or occupation tax imposed for the purposes of revenue, because the Borough of New Hope is without power to levy such tax, and even if such power had been conferred upon it it would have availed nothing. The State cannot itself impose or authorize a municipality to impose any tax upon an instrumentality of interstate commerce except by permission of Congress, as in respect to this plaintiff in error has been expressly decided by this court in Leloup *vs.* Mobile, already cited.

The lines of the plaintiff in error extend into all the cities and towns of the United States and into almost all the boroughs and villages—they have been extended into any place, however small, where population has been concentrated.

For the transaction of the business of communicating intelligence between these different points the poles of the company are as necessary as the wires through which the electric current flows, and if it be conceded, as it is conceded, that every municipality, large or small, has the right to exercise such supervision over and regulation of the poles and wires as may be needed to protect its residents from the possible negligence of the company itself, and to

impose therefor such charge upon it as may be necessary to reimburse itself the expense it thereby incurs, it follows that unless the courts interpose to limit the charges so imposed strictly within the power of the municipality, it leaves the telegraph company subject to impositions, which, in the aggregate, have already become a serious burden, and are likely, indeed certain, in the near future to become very onerous.

Each municipality, without power to impose a tax, except upon the tangible property of the company; each generally without power to charge any rental for the use of its streets, and each without the power to impose any occupation or business tax upon the company or its agents—can yet effect the same purpose by a charge, professedly based upon the number of poles within its limits, for a supervision and regulation which rarely in fact is ever exercised, and in no case is as efficient as that of the company's own agents. Accidents, indeed, from the falling of telegraph poles, or the breaking of telegraph wires are so rare that the record of the veriest few is to be found in the report books.

Telegraph companies in Pennsylvania pay not only a tax upon their capital stock, which represents the value of their property, but they also pay another tax upon their gross receipts, which represents the earning power of that property—thus, in fact, they pay a double tax, first, upon the value of the property; and, secondly, upon the value of its use—and yet in this case a Borough is permitted to impose yet another tax of sixty-six dollars a mile upon their poles and wires, an amount which is eighteen per cent. of the value thereof and an amount which is more than two-thirds of the gross local business done in the borough, even if it was done by the Western Union Company.

Nevertheless, when these pole and wire license tax cases come before the Supreme Court of Pennsylvania that court seems to disregard entirely this gross disproportion, and sixty-six dollars is in itself perhaps a small sum to regard the objection as *de minimis*, and seem, unconsciously no doubt, to compare the amount involved with the whole capital and

the whole business of the Western Union Company, and not at all with the amount of the expense of the alleged police supervision and regulation, to which under the well-settled authorities it should be limited. Thus has sprung up a system of an absolutely illegal, very onerous, and rapidly increasing taxation, not only in Pennsylvania, but in other States, and this has now gone so far that in a case just decided by a Court of Common Pleas of Pennsylvania, while this brief is in preparation, *a pole and wire tax imposed by a township has been sustained*, so that, as the law now stands in that State, every pole and every wire therein is liable to be subjected to a charge to be imposed by the municipalities in which they are, which confessedly very much exceeds in amount the limits of taxation, and which is nearly four times the cost of the maintenance and repair of the poles and wires themselves, and the measure of which seems to be confided solely to the discretion of the city, borough, and township authorities, because no other rule has ever been practically applied thereto by the courts of that State.

Against these charges, which, if carried to their necessary conclusion, will constitute the most onerous burden, by far, to which telegraph companies are subjected—in fact, if adopted in other States, would absorb nearly the whole net earnings of the telegraph companies—those companies have no protection except that afforded by the prohibition implied in the commerce clause of the Constituton of the Unted States, a protection which can only be made effective by the action of this court, and to extend which was one of the reasons for its creation. The plaintiff in error now confidently seeks in this case to have extended to it by this court the protection conferred by that Constitution.

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